United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

985

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,981

JOHN R. RYEN,

JOYCE E. RYEN and
JOHN R. RYEN, as father
and next friend of
KIMBERLY T. RYEN

Appellants,

v.

THOMAS R. OWENS,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

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AUTHORITIES CITED

Cases:

*Cases chief relied upon by Appellant.

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STATEMENT OF QUESTION PRESENTED

The Appellants, Joyce Ryen and infant Kimberly Ryen were passengers in an automobile driven by John R. Ryen, the husband and father of Appellants. The said vehicle was involved in a collision with an automobile owned and operated by Appellee. The jury returned a verdict for Plaintiffs in the sum of Twenty-five Thousand Dollars ($25,000.00);

Plaintiff, John R. Ryen, received Twenty-three Thousand Eight Hundred Ninety-three Dollars and Twenty-five Cents ($23,893.25). The Appellants, Joyce Ryen and infant Kimberly Ryen, received One Thousand Dollars ($1,000.00) and One Hundred Six Dollars and Seventy-five Cents ($106.75), respectively.

The undisputed medical testimony was to the effect that Appellants received the following injuries and suffered the following damages as a result of the said collision:

APPELLANT JOYCE RYEN -

1. Bilateral fractures of mandible of the lower jaw;
   Fractures of right cheek complex;
   Fracture midshaft of the right humerus;
   Fracture left clavicle;
   Teeth wired for period of six weeks;
   Concussion.
2. Medical expenses $609.25.
3. Permanent injuries.

APPELLANT INFANT KIMBERLY RYEN -

1. Linear fracture of the skull.
2. Medical expenses $76.00.

In the opinion of the Appellants, the question presented is:

Was the Jury verdict awarded to the Appellants so inadequate as to shock the conscience of the Court and would a miscarriage of justice occur if the verdict were allowed to stand?

This case has not previously been before this court.

REFERENCE TO RULINGS

(To be furnished)

There are no rulings in the Court Below to which this Court's attention should be called.

JURISDICTIONAL STATEMENT

This is an appeal from a verdict rendered by a jury in the U.S. District Court for the District of Columbia.

The verdict was docketed on the 13th day of October, 1969. The United States District Court for the District of Columbia has jurisdiction under Title 11, Section 521.

AGREED STATEMENT OF FACTS

The facts of this appeal arise out of a personal injury action in the Court below. The Appellants are Joyce Ryen and infant Kimberly Ryen, mother and daughter who were passengers, on November 8, 1967, in an automobile driven by John R. Ryen, a Plaintiff below, the husband and father of the Appellants. The Ryen vehicle which was owned and operated jointly by Joyce and John R. Ryen was in collision with a vehicle owned and operated by Appellee.

The Jury returned verdict for the Plaintiffs in the total amount of Twenty-five Thousand Dollars ($25,000.00) on October 13, 1969. John R. Ryen received Twenty-three Thousand Eight Hundred Ninety-three Dollars and Twenty-five Cents ($23,893.25). The Appellant, Joyce Ryen, received One Thousand Dollars ($1,000.00) and infant Appellant, Kimberly Ryen, received One Hundred Six Dollars and Seventy-five Cents ($106.75).

The medical testimony adduced at the trial was undisputed. The only doctors called were those called by Appellants. The testimony of John R. Ryen, of Appellant Joyce E. Ryen and of Doctors Clark J. Grover, Charles H. Epps, Jr. and K. Sidko were the sum total of testimony as to injuries, the extent thereof, pain and suffering and damages incurred by Appellants as a result of the automobile collision.

The transcript discloses that the first recollection that Appellant, Joyce Ryen, had after the collision, was waking up in the Emergency Room at District General Hospital. She remembers having the back of her head shaved and sutured, of receiving a hypodermic and having a cast placed on her right arm.

Appellant, Joyce Ryen's injuries during her hospitalization were diagnosed as: bilateral fractures of mandible of the lower jaw; fractures of right cheek complex; fracture midshaft of the right humerus; fracture left clavicle; concussion.

Appellant, Joyce Ryen's next recollection after the initial Emergency Room treatment was the morning of November 8, 1967, when she was taken to the dental clinic as a result of bilateral fractures to her jaw. Her teeth were wired together after having received fourteen (14) shots of novocain. Her mouth was wired shut for approximately six (6) weeks. She was unable during this period to take any food except liquids.

On approximately November 11, 1967, she was placed under general anesthesia, operated on for the correction of the complex fractures involving her cheek bones, and the orthopedic surgeon manipulated and set the break in the right humerus at the same time.

On approximately the 15th day of November, 1967, the small cast that had been placed on her arm in the Emergency Room was removed from the right arm and a figure eight cast was placed on her body to hold in place both the broken right humerus and the left clavicle. Appellant, Joyce Ryen, described the cast as follows:

"They first put a cast around my waist and it came up under me and had a figure eight cast around my shoulder. It looked something like a football player would wear and lifted this arm up and this arm was lifted up somewhat, then the cast extended down this arm and went around my hand and these fingers were free and the thunb was free and my arm was in somewhat of a position like this, and from this bottom cast they had a board that went up like this and held this arm out."

She remained in this "figure eight" cast for a period of approximately four (4) weeks when she was again re-casted to a smaller cast.

Upon her discharge from the hospital she returned home. She lived with neighbors for one week. She then returned to her own apartment. She had no domestic nor nursing help during any of her convalescence, but that she and her family were cared for by neighbors and friends.

That during the first four weeks at home, Appellant was unable to take care of her own personal needs, dressing washing, bathing. Appellant was not able to take care of infant Appellant and that it was not possible for her to do her cooking or housework during this period.

That approximately six weeks after the injury her teeth were unwired in the reverse of the initial procedure with the need for approximately 15 or 16 shots of novocain.

The Appellant, Joyce Ryen suffered no loss of earnings and has improved continually since receiving her injuries. That on the date of the trial the orthopedic surgeon, Dr. Charles H. Epps, described the limitation to Appellant as follows:

"There is perhaps a ten-degree internal rotation and not disabling from a functional point of view." (T. pg. 27)

Dr. Clark J. Grover in his testimony stated that Appellant, Joyce Ryen, experienced discomfort in the sinus area and in response to whether this condition was permanent, answered:

"There is no permanency at the present time. There is one extenuating circumstance we should mention. The bones which you are talking about and fracture are repositioned in a satisfactory position but there is a fair number of patients who experience this cheekbone fracture which have some residual problems as far as functioning of the sinus; not perfectly the position of the bone itself which is normal and in good position but some residual problems do ensue from the function of the sinus." (T. pg. 22)

When asked what these residuals were, Dr. Grover replied:

"The patient who would sustain this type of injury, also the injury involves the sinus position in the upper jaw bone below the eye, the fracture normally goes through the sinus and causes some damage to the membrane in the sinus which becomes inflamed, then once it becomes inflamed it's very difficult for the body to normally clear it up because of the architecture of the sinus so that the patient who has had this type of injury for an unknown but somewhat substantial period of time may experience some difficulty with sinus problems." (T. pg. 22)

Dr. Grover was asked:

"So you can't say then with any degree of medical certainty there will be any permanent condition resulting with this lady?"

He replied:

"It would only be to state what I said before that if the patient's symptons are such and there is the disability, we can only go on what the patient verbally says, the symptoms and she did relate to me she did experience unilaterial discomfort and I did not see her at the time she was experiencing this discomfort." (T. pg. 24)

Infant Appellant was admitted to District General Hospital on the evening of the accident. A diagnosis was made as follows:

"Fracture of the occipital bone"

and was confirmed by X-ray. That she remained in hospital until the following morning when she was released.

Dr. Epps in his testimony as to Appellent, Kimberly Ryen stated:

Q. "As to Kimberly, so far as you know, never received any treatment except the examination?" A. "I think she was observed for a few days in the hospital."

Q. "So far as actual treatment there was none?" A. "So far as I know." (T. pg. 28)

It did not appear that infant Appellant, Kimberly Ryen, had any residual at the time of the trial in Court below.

That subsequent to the docketing of the verdict, the Appellee timely filed a motion for judgment *non obstante verdicto* or in alternative a new trial. That on the 24th November 1969, the Court below denied the motion.

That on the 3rd day of December 1969, Plaintiffs below were advised by Appellee's counsel that he was ready and willing to pay the judgment obtained by the Appellants.

As to the verdict obtained by Plaintiff below, John R. Ryen, Fifteen Thousand Dollars ($15,000.00) was paid on Appellee's counsel advice, that this amount was the limit of liability for one person under the terms of the contract of insurance existing between the Appellee and his insurance carrier.

ARGUMENT

I

When Is A Verdict Inadequate?

II

Were Jury Verdicts So Inadequate As To Shock Conscience Of The Court?

III

Use of Comparable Verdicts In Absence Of Norm Or Standard.

IV

Verdict Should Not Be Allowed To Stand But Case Should Be Remanded For New Trial On Damages Alone.

V

Failure Of Appellants To Request Judgment *Non Obstante Verdicto* or New Trial Of Trial Judge.

I

On October 13, 1969, a jury verdict was entered for Appellant Joyce Ryen in the amount of One Thousand Dollars ($1.000.00) and for infant Appellant Kimberly T. Ryen in the amount of One Hundred Six Dollars and Twenty-five Cents ($106.25).

The serious, extensive and permanent injuries, the pain and suffering of the Appellant, Joyce Ryen, and to a lesser degree, the seriousness of the skull fracture and expenses incurred on behalf of the infant Appellant, Kimberly T. Ryen, make the question of the adequacy of the damages rendered by the jury to the Appellants, suspect.

James Fleming, Jr., in an article on the excessiveness and inadequacy of verdicts, Duquesne University Law Review, Vol. I - 1963, page 143, comments:

"The commonest explanation is it (an inadequate verdict) represents a compromise on the jury's part on issues of liability," (words enclosed, supplied).

It does not follow logically that this can be the explanation in this case. Here both Appellants were passengers in the automobile driven by John R. Ryen. If the jury had compromised, however improperly, it certainly would have done so against the only one in the Ryen vehicle who could have contributed to the accident—the driver. The fact that the Plaintiff driver received a verdict in excess of Twenty-three Thousand Dollars ($23,000.00) would appear to exclude the case at Bar from James Fleming's commonest explanation for the inadequate verdict.

The real issue is not why the jury brought back an inadequate verdict but did they bring back an inadequate award. In the determination by the Courts of the excessive or inadequate verdict, one is constantly faced with the language, is the verdict so excessive or inadequate as to shock the conscience of the Court.

In the case of *Frank v. Atlantic Greyhound Corporation*, 172 F. Supp. 190-191, Judge Holtzoff attempted to give meaning to this figure of speech when he stated, "Obviously shocked the conscience is but a pictureless figure of speech. The test is whether the verdict is so unreasonably high as to result in a miscarriage of justice." For the purpose of the litigation at hand the word "low" could obviously be substituted for the word "high" without doing damage to its meaning. Judge Holtzoff, in further determining if a miscarriage of justice had occurred, suggests the following criteria:

"Necessarily, damage for personal injury cannot be computed mathematically with calculations on the basis of any formula. A large range of action must be afforded the jury. Nevertheless, one of the matters that the Court must take into consideration is in connection with other circumstances and the range of verdicts in other cases involving similar injuries in the jurisdiction in which the trial is held. Otherwise, all attempts at some modicum of equal justice would be at an end."

When is an award so inadequate as to shock the conscience of the Court to cause a miscarriage of justice to occur? Plain justice demands there must certainly be a relationship between the award and the injury and the damages incurred. The Court stated in *Reisbert v. Waters*, 111 F.2d 595 6th Cir., "A verdict is inadequate, as the word is used here, only when it fails to cover proven damages to which Plaintiff is legally entitled–if he deserves coverage at all." A verdict for out-of-pocket expenses or less, in a serious or painful personal injury case would furnish an example: *Smith v. Webber*, 282 SW 346 Ky. 1955; *Simmons v. Fish*, 210 Mass. 563; *Dolan v. Beatrice Rest Co.*, 137 Neb. 247.

II.

The jury here found no negligence on the part of any of the Plaintiffs and further gave a substantial verdict to the driver Plaintiff, John R. Ryen. The Appellant, Joyce Ryen,

however, received a total of only $1,000.00 with stipulated medical expenses incurred amounting to $609.25. Subtracting the actual medical expenses from the verdict, we have remaining the sum total of $390.75 for the pain and suffering and the permanent effect of her injuries. Appellant, Kimberly T. Ryen, had medical expenses of $76.00. Subtracting this expense from the amount received in the verdict, we have remaining an amount of $30.75 as compensation for a fractured skull.

Balancing now, this $395.70 received by Appellant Joyce Ryen and the $30.75 received by the infant Appellant, Kimberly Ryen, against the actual injuries they received, for the purpose of determining if there is such inadequacy in the verdict as to shock the conscience of the Court.

The following history, treatment, the pain and suffering and permanency of their injuries, as taken from the Agreed Statement of Facts, should assist in making this determination.

> That the first recollection of Appellant, Joyce Ryen, after the collision was walking up in the emergency room at District General Hospital. She remembers having the back of her head shaved and sutured, of receiving a hypodermic and having a cast placed on her right arm.
>
> Appellant, Joyce Ryen's injuries during her hospitalization were diagnosed as: bilateral fractures of mandible of the lower jaw, fractures of right cheek complex; fracture midshaft of the right humerus; fracture left clavicle; concussion.
>
> Appellant, Joyce Ryen's next recollection after the Emergency Room treatment was the morning of November 8, 1967, when she was taken to the dental clinic as a result of bilateral fractures to her jaw. Her teeth were wired together after having received fourteen (14) shots of novocain. Her mouth was wired shut for approximately six (6) weeks. She was unable during this period to take any food, except liquids.

On approximately November 11, 1967, she was placed under general anesthesia, operated on for the correction of the complex fractures involving her cheek bones. The orthopediac surgeon minulated and set the break in the right humerus at the same time.

On approximately the 15th day of November, 1967, the small cast that had been placed on her arm in the Emrgency Room was removed from the right arm and a figure eight cast was placed on her body to hold in place both the broken right humerus and the left clavicle. Appellant, Joyce Ryen, described the cast as follows:

"They first put a cast around my waist and it came up under me and had a figure eight case around my shoulder. It looked something like a football player would wear and lifted this arm up and this arm was lifted up somewhat, then the cast extended down this arm and went around by hand and these fingers were free and thumb was free and my arm was in somewhat of a position like this and from this bottom cast they had a board that went up like this and held this arm out."

That she remained in this figure and cast for a period of approximately four (4) weeks when she was again re-casted to a smaller cast.

That upon her discharge from the hospital she returned home. That she lived with neighbors for one week. She then returned to her own apartment. She had no domestic nor nursing help during any of her convalescence, but that she and her family were cared for by neighbors and friends.

That during the first four weeks at home, Appellant was unable to take care of her own personal needs, dressing, washing, bathing. Appellant was not able to take care of infant Appellant and that it was not possible for her to do her cooking or housework during this period.

> That approximately six weeks after the injury her teeth were unwired in the reverse of the initial procedure with the need of approximately 15 or 16 shots of novocain.

Both verdicts awarded to Appellants were in amounts only slightly greater than the actual medical expenses. The amounts of the verdict above these expenses are so insignificant as to be no award at all for the pain and suffering, loss of use and permanency.

The agreed statement of facts further indicates that the Appellant, Joyce Ryen, suffered permanent injury to her left upper extremities and in addition residual problems in the function of sinus.

III

This Court as recently as 1967, in the case of *Engle v. Stull*, 126 U.S.App. D.C. 291 recognized the absence of a norm or standard to guide us in determinations of this nature when it stated: "Obviously, one can characterize a cut on the thumb not meriting an award of $21,000.00 One can compare this with other verdicts and judgments for other injuries, but there is no rule of thumb that can furnish a fair guide to fairness."

Deprived of any actual rule of thumb or any criteria, we must again revert to the query, "Is the award so small that it shocks the conscience of the Court or if allowed to stand would a miscarriage of justice take place."

A review of the vast number of cases across the land and those in this jurisdiction, dealing with the question of excessive and inadequate verdicts, one is hard pressed to cite even one case where the injuries are so similar to the case at hand as to be worthy of comparison. Always the small differences arise that make for valid distinctions. Recognizing this inherent problem, it is still necessary to refer to awards for comparable injuries, to allow us a starting point on what is excessive, not excessive, adequate or inadequate in comparable injuries.

In *Engler v. Stoll*, it is interesting to note that this Court refused to disturb an award for an injury to a thumb in the amount of $21,000.00. Without disparaging an injury to the thumb, when compared to the serious and painful injuries received by both the Appellants herein, there does not even seem to be a basis for a meaningful comparison. Yet, in that case the Court did not see fit to disturb the verdict of $21,000.00.

In the case of *Thomas Johnson v. Theodore Jackson*, 178 A.2d, 327, the Municipal Court of Appeals was asked to find as excessive a judgment in the amount of $3,500.00 for injuries received by the Plaintiff. The injury therein consisted of a compound fracture of the mandible bone in which there was hospitalization of 8 days with the teeth wired together for the six-week period. The Court in that case refused to disturb the verdict. The similarity between the two cases is the broken jaw, the only injury involved in the Johnson case. Whereas in the case at Bar, this was one of many serious injuries.

Continued comparison with verdicts in this jurisdiction and others would not appear to be necessary or helpful. The seriousness of the injuries suffered by the Appellants, their pain and suffering and permanency, make the unfairness of the awards patent. The damages simply do not equate with the amount of the verdict and if allowed to stand would certainly result in a miscarriage of justice.

IV

It is understood and accepted that the jury must be given great latitude in the amount awarded for damages. This too has limitations and as Judge Holtzoff states in *Preston v. Safeway Stores*, 163 F. Supp. 749, "There must manifestly be a considerable range within which the jury may operate. It is only if the amount of damages assessed by the jury is beyond the bounds of reason or as is sometimes said, 'shocks the conscience of the Court,' that it may be

deemed excessive and a new trial granted on those grounds." The same logic is equally applicable to a verdict which is below the bounds of reason.

It is respectfully suggested that the jury awards in this case are beyond all bounds of reason and comes squarely within the purview of, "shocking the conscience of the Court." This Court has not hesitated in the past to remedy an award that was obviously not in conformance with the evidence and by allowing it to stand a miscarriage of justice would result. The case of *Boyle v. Bond*, D.C. Cir. 1951, 187 F.2d 362, dealt primarily with an excessive award but its logic is equally applicable to the reverse situation of an inadequate award. The Court, in the opinion by Judge Proctor, found as its starting premise: "Obviously it is a grossly excessive and the verdict should not be allowed to stand for the sum returned."

Further, in its opinion, in explanation for its decision, the Courts states: "However, the verdict, unsupported in a large part by the evidence has resulted in a grossly excessive judgment; which in justice cannot stand. Although the record reveals a fair and impartial attitude by the presiding judge, in denying the motion for a new trial there was a failure to recognize the great disparity between the proof and the jury award, which technically constituted an abuse of discretion amounting to an error of law. *Virginia Ry. Co. v. Armentrout* 4 Cir. 1948, 166 F.2d 400; *Cobb v. Lopisto*, 9 Cir. 1925, 6 F.2d 128. See also comments of Judge Augustus Hand in *Pettingill v. Fuller*, 2 Cir. 1939, 107 F.2d 933, certiorari denied; 1948, 309 U.S. 669, 60 S. Ct. 609, 84 L. Ed. 1015. *Fairmont Glass Works v. Cob Fork Coal Co.* 1933, 287 U.S. 474, 53 S. Ct. 252, 77 L. Ed. 439, and *Washington Times Co. v. Bonner*, 936, 66 App. D.C. 280, 86 F.2d 836, 110 D/B 393 do not apply, for in those cases no abuse of discretion was found.

A finding by this Court that the jury verdict was so inadequate as to demand a new trial would be in conformance with the facts in the case. A new trial should be confined

to damages alone. The Court below has found that the jury was justified in finding no negligence on the part of the Appellants and that the accident was due to the sole negligence of Appellant Ownes. (App. 1) Having so found Appellants should not be subject to another trial on any issue but damages alone.

In the case of *Steinberg v. Dixon* 192 A.2d 359, the Court, after having found the jury award inadequate ordered a new trial on all issues. In reversing the Circuit Court stated: "The sole reason for granting a new trial was the inadequacy of the verdict. There was ample evidence which proved the accident due to the sole negligence of defendant Andrew Dixon, and the jury was justified in finding no negligence on the part of Mr. Kesselman. The Court committed a clear abuse of discretion in granting a new trial as to addition defendants who, having been exculpated from any negligence, should not be subject to another trial," citing cases.

V

The question then immediately presents itself: Why did not the Appellant request the usual review by the Court below, at the proper time, in the form of a motion for judgment *non obstante verdicto* or in the alternative, a motion for a new trial.

Although the award of the jury was disappointing, it was considered as a family verdict and it was the decision of Plaintiffs below that it be accepted and that no review or appeal be requested. The Appellee, however, did move subsequent to the rendering of the verdict, for a judgment *non obstante verdicto* or a new trial, both of which were denied by the Court on the 24th day of November 1969. (App. 1)

On or about the 3rd day of December 1969, the Plaintiffs were informed by Defendant that because of the manner of the division of the verdict between Plaintiffs, the full amount of said verdict would not be paid. That

the limit of liability for one individual was $15,000.00 under Defendant's contract of insurance with his carrier.

This information came to Appellee approximately seven (7) weeks after the rendering of the verdict by the jury. The time for the filing of motions after trial had long since passed and the only remedy left to the Appellants, Joyce Ryen and infant Kimberly Ryen, is the relief being asked for in this appeal.

CONCLUSION

The question presented in the conclusion is a simple one: Is the Court shocked by the amount of damages awarded to Appellants for the injuries received? In the alternative would a miscarriage of justice occur if the jury verdict in this case were allowed to stand?

It is respectfully suggested to this Court that the jury award is so inadequate as to shock the conscience of the Court and that the matter be remanded to the Court below for a new trial on the issue of damages alone.

Respectfully submitted,
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Attorney for Appellants

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN R. RYEN, et al	)	
Plaintiffs	:	
v.	)	
	:	Civil Action No. 324-68
THOMAS R. OWENS	)	
Defendant	:	

MEMORANDUM AND ORDERS

In this personal injury action the jury returned a verdict for plaintiffs in the sum of $25,000.00 against defendant Thomas R. Owens. Plaintiff, John Ryen, received $23,893.25 while the other two plaintiffs, Joyce and minor Kimberly Ryen, received $1,000.00 and $106.75, respectively. The jury also found that defendant was not entitled to recover on his counterclaim for personal injury and property damage. Defendant now moves for a judgment *non obstante verdicto* against plaintiff, John Ryen, on the ground that he was contributorily negligent as a matter of law. In the alternative, defendant seeks a new trial.

Although defendant makes no claim that the verdict in favor of Joyce Ryen be set aside, it would be inconsistent to hold John Ryen contributorily negligent as a matter of law without so holding Joyce Ryen. Joyce Ryen owned the vehicle which John Ryen was operating at the time of the accident, and any negligence found to have been committed by John Ryen would necessarily be imputed to Joyce Ryen. At the close of all the evidence the Court concluded, and all parties agreed, that if plaintiff, John Ryen, was entitled to recover, plaintiff, Joyce Ryen, was also entitled to be compensated for her damages. The Court so instructed the jury. Therefore, if defendant's present motion is to be granted, in whole or in part, it must operate against two plaintiffs, John and Joyce Ryen.

As to the verdict for minor plaintiff, Kimberly Ryen, defendant makes no claim that a new trial or judgment *non obstante verdicto* should be granted. Since she was merely a passenger in the car driven and owned by the other plaintiffs, the issue of contributory negligence does not affect the validity of her recovery. Defendant seeks only to have the Court hold that John and Joyce Ryen were contributorily negligent as a matter of law, which negligence proximately contributed to their injuries, thus barring them from recovery and requiring that the verdict in their favor be set aside.

It must be kept in mind at the outset that on a motion for judgment *non obstante verdicto* it is fundamental that the evidence be considered in the light most favorable to plaintiffs[1] and it is within the Court's sound discretion whether to grant a new trial.[2]

It appears without dispute from the evidence in this case that on November 8, 1967, at about 12:45 A.M. plaintiff, John Ryen, was operating an automobile owned by him and his plaintiff wife, Joyce Ryen, on Pennsylvania Avenue, S.E. in the District of Columbia. With John Ryen in the front seat of the car were his wife, Joyce Ryen, and their three year old daughter, Kimberly Ryen. They were travelling in an easterly direction. At about the same time, defendant counter-claimant, Owens, was operating his car on Southern Avenue, S.E. in the District of Columbia. He was travelling in a northerly direction.

Within the intersection of Pennsylvania Avenue and Southern Avenue the two cars collided. It was dark, the weather was clear, and traffic at the intersection was controlled by operating traffic signals. After impact the Ryen vehi-

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[1] E.g., Muldrow v. Daly, 329 F.2d 886 (D.C. Cir. 1964); Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller, 292 F.2d 775 (D.C. Cir. 1961).

[2] E.g., Ruppert v. Ruppert, 134 F.2d 497 (D.C. Cir. 1942); Washington Times Co. v. Bonner, 86 F.2d 836 (D.C. Cir. 1936).

cle ended up on its side in the northwest section of the intersection, and the automobile owned and driven by Owens came to rest after striking a telephone pole on the northeast corner of the intersection.

Defendant makes no claim that the evidence does not sustain the conclusion that he was negligent. Nor does defendant contend that the damages awarded to plaintiffs by the jury were excessive. He simply argues on this motion that plaintiff, John Ryen, should have been barred from recovery on the ground that he was contributorily negligent as a matter of law which contributory negligence proximately concurred in causing plaintiffs injuries. For reasons stated below, defendant's motion for judgment *non obstante verdicto* or a new trial is denied

Defendant first contends that it was he, not plaintiffs, who had the green light upon entering the intersection. In support of this argument defendant points to the testimony of a witness to the accident who stated that when the Ryen vehicle was 100 feet from the intersection the light for plaintiffs on Pennsylvania Avenue was yellow, and that the next time he looked the Ryen vehicle was in the intersection and the light was red. Defendant testified that he had the green light when he entered the intersection.

Even though defendant testified that he had the green light, the jury was not required to accept his testimony. The jury could reject his testimony in whole or in part, especially in view of the fact that there was evidence that he had been drinking before the accident. However, there was a substantial amount of other evidence introduced to show that it was Ryen who had the green light. Where it is necessary, as it is on this motion, to examine the evidence in the light most favorable to plaintiffs, defendant's emphasis on that part of the testimony which favors only his claim is misplaced.

Plaintiff, John Ryen, testified that when he first saw the light at the intersection of Pennsylvania and Southern Avenue it was red for him and the other traffic moving along

Pennsylvania Avenue. He further testified that at about 100 feet from the intersection the light changed to green and remained green until the time of the accident within the intersection. Joyce Ryen's testimony corroborated her husband's version of the sequence of the traffic signal. On rebuttal, plaintiffs produced a witness in charge of traffic signal sequencing for the District of Columbia who testified as to the sequence of the traffic signals along Pennsylvania Avenue at the intersections with Alabama and Southern Avenue. He stated that on the day of the accident and at the time of the accident when the light for traffic on Pennsylvania Avenue at Alabama Avenue changed from red to green, the light at Southern Avenue for Pennsylvania Avenue traffic was yellow. It remained yellow for eight seconds and then changed to red, so remaining for thirty more seconds before turning to green. This testimony tended to corroborate plaintiff's version that the light at Southern Avenue and Pennsylvania Avenue turned to green for them as they approached the intersection. The jury could well give weight to this testimony coupled with plaintiffs' testimony as to speed and other factors.

Taking the evidence in the light most favorable to plaintiffs, it is clear that the jury was warranted in finding, as is implicit in their verdict, that plaintiff, John Ryen, entered the intersection of Pennsylvania and Southern Avenue on a green light and was travelling at a reasonable rate of speed.

Throughout the trial and in his closing argument counsel for defendant placed great emphasis on the question of who had the green light. In this motion defendant contends that, even conceding that plaintiffs had the green light, the Court should rule that because plaintiff, John Ryen, did not see defendant before the moment of impact he was guilty of contributory negligence as a matter of law. Defendant argues that plaintiff was contributorily negligent because he entered the intersection blindly, not seeing what there was

to be seen, and because he entered the intersection in the face of danger. The Court has carefully examined the relevant case law in this jurisdiction as well as in other jurisdictions and finds that the overwhelming weight of authority holds that a driver of an automobile is not negligent as a matter of law merely because he assumes upon entering an intersection with a green light that other traffic faced with a red light will obey that signal.

In *Sher* v. *DeHaven*[3] our Court of Appeals was faced with a claim by defendant that plaintiff was contributorily negligent as a matter of law because he failed to avoid an intersection collision. Plaintiff had stopped at the intersection and then proceeded ahead because defendant's car had not reached the intersection which was protected on his side by a stop sign. The Court of Appeals refused to hold that plaintiff was contributorily negligent as a matter of law stating:

> DeHaven (plaintiff) had a right to suppose Sher (defendant) would obey the stop signal. Sher did not do so.[4]

In the District of Columbia Court of Appeals it has been held that the question of contributory negligence is for the jury to resolve in a case where the defendant is faced with a stop signal. Thus, in *Borror* v. *Kissinger*[5] the Court held that where plaintiff proceeded into an intersection on the assumption that defendant would stop for a flashing red light the question of plaintiff's contributory negligence was one of fact and not subject to a ruling by the Court as a matter of law.

It is true that in the present case plaintiff admitted that he did not see defendant before the moment of impact.

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[3] 199 F.2d 777 (D. C. Cir. 1952)

[4] Id., at page 782.

[5] 173 A.2d 223 (D. C. C. A. 1961).

However, this fact alone does not require a finding of contributory negligence. Even if plaintiff, John Ryen, had seen defendant before the collision, the question would remain whether in entering the intersection with a green light he should have been aware that defendant might not heed the red light facing him. Neighbor party requested an instruction on last clear change. It was nighttime, and there was evidence that defendant had been drinking. From the evidence the jury was justified in believing that defendant entered the intersection at such a high rate of speed that plaintiff would have been unable to avoid the accident even if he had seen defendant.

To hold as a matter of law that plaintiffs, John and Joyce Ryen, were contributorily negligent under all the circumstances of this case would necessitate a finding that despite a green light a motorist must stop at an intersection before entering or at least exercise the same degree of care demanded where the intersection is not controlled by operating traffic signals.

Courts in many jurisdictions have declined to hold a party negligent under facts similar to those involved here. For example, in *Nolan v. Sullivan*[6] the trial court, in a wrongful death action arising out of an intersection collision, found that plaintiff was contributorily negligent because . he did not adhere to the standard of care required of a motorist entering an uncontrolled intersection. The Court of Appeals for the Third Circuit reversed, stating the Pennsylvania law as follows:

> . . . a motorist who enters an intersection on a green light in his favor may not be held to the same standard of care as the driver who enters an uncontrolled intersection. (Citing cases)[7]

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[6]372 F.2d 776 (3rd Cir. 1967). See also Smith v. Rogers, 290 F. 2d 601 (7th Cir. 1961); Gomez V. United States, 246 F. 2d 878 (7th Cir. 1957); Van Wie v. United States, 77 F. Supp. 22, 37 (N.D. Iowa 1948),

[7]Nolan v. Sullivan, *supra*, 372 F.2d 776, 779 (3rd Cir. 1967).

The court also quoted *Jordan v. Kennedy*,[8] a Pennsylvania case outlining the reasons justifying a lesser standard of care for motorists travelling with a green light.

> 'Although one approaching a street intersection must always be vigilant, he cannot be held to the same high degree of care at an intersection with a traffic light giving him the right of way as at an intersection where there is nothing to regulate the right of way. He need not approach an intersection with a green light *quite so slowly, nor look so continuously for approaching traffic*, first because he has a right to assume traffic on the intersection street will stop for the red light and secondly because he must divide his attention between the approaching traffic and the light.[9]

The Court of Appeals went on to reject findings by the trial Court almost exactly like those which defendant seeks here, viz. that because plaintiff did not swerve and was looking straight ahead at the time of impact and because with the exercise of extra diligence he could have seen defendant's car, plaintiff was contributorily negligent. The Court of Appeals stated:

> The court's rationale was at best conjectural and seemingly accorded little significance to the presumption of due care favoring the decedent and the burden of the defendant to overcome the presumption by a fair preponderance of the evidence.[10]

In *Gladysz v. United States*[11] the District Court for the Middle District of Pennsylvania stated the policy underlying the standard of care for a motorist who is favored with a green light.

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[8] 180 Pa. Super. 593, 119 A.2d 679 (1956).

[9] Nolan v. Sullivan, *supra*, 372 F.2d 776, 779 (3rd Cir. 1967), quoting Jordan v. Kennedy, 180 Pa. Super. 593, 119 A.2d 679, 681 (1956).

[10] Nolan v. Sullivan, *supra*, 372 F.2d 776, 779 (3rd Cir. 1967).

[11] 100 F. Supp. 205 (M.D. Pa. 1951).

> 'To require one proceeding with a "go" signal, even after he is in the intersection, to be continually watching traffic approaching but not yet in or at the intersection, with his automobile under such control as to stop it immediately to avoid coming into contact with an automobile disobeying the traffic signal, would obviously prevent the necessary and desirable movement of traffic.' Graff v. Scott Bros., Inc., 315 Pa. 263, at page 268, 172 A.2d 659, 661. . .[12]

Defendant cites several cases in an effort to support his contention that plaintiff was contributorily negligent even if he had the green light. All are distinguishable from the instant case and do not lend weight to defendant's position on this motion.

In *Brown v. Clancy*[13] the District of Columbia Court of Appeals held a motorist contributorily negligent as a matter of law. There, however, the motorist was confronted with a flashing red light, not a green light. Obviously, the standard of care required in *Brown* was not the same as that applying in the instant case.

In *Singer v. Doyle*[14] the District of Columbia Court of Appeals held the plaintiff contributorily negligent as a matter of law because he attempted to make a left hand turn into the path of oncoming traffic. In that case defendant had the right of way and it was the responsibility of the motorist desiring to make a left hand turn to yield to the defendant. On the evidence presented in the present case, when viewed in the light most favorable to plaintiffs, defendant, by entering the intersection on a red light, did not possess the right of way.

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[12] Id., at page 208.

[13] 43 A.2d 296 (D. C. C.A. 1945).

[14] 236 A.2d 436 (D. C. C. A. 1967).

In *Scull v. Epstein*[15] plaintiff was held contributorily negligent because he had entered an intersection after observing that defendant had ignored a red light. Plaintiff Ryen, on the other hand, testified that he did not see defendant eighter approach the intersection or in the intersection before the moment of impact. Ryen, therefore, cannot as a matter of law be deemed to have entered an intersection in the face of danger caused by a driver who had ignored a light of red before plaintiff had reached the intersection.

Similarly, *Valench v. Belle Isle Cab Co.*[16] is distinguishable on its facts. The theory of *Valench* would apply only where a motorist begins to enter an intersection immediately after the light has changed to green and at a time when other traffic may possibly still be lawfully within the intersection. In this case, however, the jury could have decided that plaintiffs entered the intersection when that possibility no longer existed.

From the above discussion it is abundantly clear that the facts of this case supported by the relevant case law provide ample justification for the jury's verdict. The evidence was disputed as to every essential fact concerning liability of defendant, viz. the color of the light for each of the parties, the respective speeds of the vehicles involved, and the exact circumstances and direction of impact. Implicit in the jury's verdict for plaintiffs is the conclusion that defendant's negligence was the sole proximate cause of the injuries sustained by plaintiffs. Neither the evidence in the case nor the law relating to intersection collisions where traffic signals are present require reversal of the jury's determination.

For the foregoing reasons it is

[15] 167 Pa. Super. 575, 76 A.2d 245 (1950).

[16] 196 Md. 118, 75 A.2d 97 (1950).

ORDERED that defendant's motion for judgment *non obstante verdicto* or a new trial be and the same is hereby in all things denied.

/s/ Luther W. Youngdahl
Judge

November 24, 1969

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,981

JOHN R. RYEN,
JOYCE E. RYEN and
JOHN R. RYEN, as father
and next friend of
KIMBERLY T. RYEN

Appellants,

v.

THOMAS R. OWENS,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE

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JOYCE E. RYEN and
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Appellants,

vs.

THOMAS R. OWENS,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE

STATEMENT OF QUESTION PRESENTED

The appellee does not question appellants' statement of questions presented.

REFERENCE TO RULINGS

There are no rulings in the court below to which this court's attention should be called.

JURISDICTIONAL STATEMENT

Appellee does not question the jurisdictional statement as stated.

AGREED STATEMENT OF FACTS

Appellee does not question the agreed statement of facts as set forth in appellants' brief.

ARGUMENT

I

Failure of Appellants to Request Judgment Non Obstante Verdicto or New Trial of Trial Judge.

II

Inadequacy of Verdict

III

Case Should Not Be Remanded For New Trial on Damages Alone.

I

Appellants are now asking this court for a new trial solely on the question of damages even though they failed to move for a new trial or for judgment non obstante verdicto within the time prescribed by Rule 59(b) of the Federal Rules of Civil Procedure which reads as follows:

> "A motion for a new trial should be served no later than 10 days after the entry of the judgment."

The appellee did file a motion for new trial or for judgment non obstante verdicto within the time prescribed. However his motions concerned themselves solely with the claim of John R. Ryen, individually, and did not involve the claims of the appellants herein.

Not only did the appellants herein not file a motion for new trial within ten (10) days of the judgment but they also failed to note an appeal until long after the thirty (30) days allowed under Rule 4(a) of the Federal Rules of Appellate Procedure following the entry of judgment. For that reason alone, the appeal should be dismissed. Rule 4(a) of the Federal Rules of Appellate Procedure reads as follows:

> "In a civil case *** in which an appeal is permitted by law as a right from a district court to a court of appeals the notice of appeal required by Rule 3 should be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from;***"

There were three plaintiffs in this case who were members of one family; namely, a husband, wife and child. Although all three claims were joined in one suit, the causes remain as separate and distinct as if separate suits had been commenced. Lansburghs and Bro. vs. Clark, 75 U.S. App. D.C. 339, 127 F.2d 331. If these causes should be treated separately, it would seem therefore that the obligation of each to file a motion or to appeal should be treated separately. The appellants herein not having filed notice of appeal within a time prescribed should not now be allowed to be heard on their motion for new trial.

II

Arguments I, II and III made by appellants we believe are answered herein.

It is interesting to note that the appellants in their last argument admit that they did not file a motion for new trial or for judgment non obstante verdicto. They gave as their reason for not seeking a review or an appeal the fact that, "Although the award of the jury ($25,000.00) was disappointing, it was considered as a family verdict and it was the decision of the plaintiffs below that it would be accepted ***." (Appellants' Brief, page 15). It would seem from that statement that they were satisfied with the total amount of the verdict.

Nine (9) days after the trial court denied appellee's motion for new trial concerning the claim of John R. Ryen, appellants' counsel was notified that appellee's insurance company was ready and willing to pay Fifteen Thousand Dollars ($15,000.00), the full amount due under the terms of the policy, on the judgment obtained by John R. Ryen and all of the judgments obtained by appellants herein. It should be noted that John R. Ryen was paid the sum of Fifteen Thousand Dollars ($15,000.00) and appellee's offer to pay the full amount of appellants' judgments was refused by counsel for appellants. It was not until that time that appellants decided that the amount of the verdict was inadequate.

It would seem to appellee that the defendant's ability to pay a judgment is not and should not be the criteria to determine the adequacy or inadequacy of the judgment. Certainly it would have

been improper during the trial of this case to have the jury concern itself with the financial abilities of the defendant to pay a judgment and appellee does not believe that same question should be considered at this time in determining the value of the damages.

III

Because of appellants' belief that they considered this to be a family verdict and therefore were satisfied not to take further action, it would seem to allow a new trial solely on the question of damages as to the appellants would be a miscarriage of justice considering the rights of the defendant. If a new trial were to be had only as to the wife and child, bearing in mind the family verdict theory, the husband John R. Ryen could conceivably be unjustly enriched to the detriment of the appellee as such a new trial on damages alone would possibly increase the verdict against the defendant without credit being given him for the $15,000.00 which has already been paid in his behalf. To put it another way, a strong inference is that $23,893.25 was more than enough for the husband, John R. Ryen, and the jury undoubtedly considered that part of the sum would inure to the benefit of appellants herein as well as to John R. Ryen.

CONCLUSION

It is respectfully suggested to this court that the judgment rendered below should be affirmed.

Respectfully submitted,
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